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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Juanita T. Aguayo,

10 Plaintiff,

11 v.

12 Commissioner of Social Security
13 Administration,

14 Defendant.

No. CV-17-1795-PHX-DMF

ORDER

15 Plaintiff Juanita T. Aguayo appeals from the denial of her application for benefits
16 from the Social Security Administration. This Court has jurisdiction pursuant to 42
17 U.S.C. § 405(g) and, with the parties' consent to Magistrate Judge jurisdiction, pursuant
18 to 28 U.S.C. § 636(c). As detailed below, the Court concludes that the ALJ's opinion
19 contains non-harmless legal error and remands for an award of benefits.

20 **Background**

21 Aguayo was 52 years old on the alleged onset date. (Tr. 12, 32) She has a GED
22 and past relevant work that included appointment clerk. (Tr. 52-53)

23 The ALJ decision followed the requisite five step process. (Tr. 12-22) The ALJ
24 found that Aguayo had not engaged in any substantial gainful activity since her alleged
25 onset date. (Tr. 14) Next, the ALJ found that Aguayo had the following severe
26 impairments: fibromyalgia, degenerative disc disease of the cervical spine, and
27 rheumatoid arthritis. (Tr. 14-16) However, these impairments did not meet or medically
28 equal the severity of any listed impairments. (Tr. 16-17) The ALJ found that Aguayo

1 had the residual functional capacity to perform sedentary work subject to several
2 additional limitations. (Tr. 17-20) As part of this finding, the ALJ concluded that the
3 record did not support Aguayo's alleged limitations. Accordingly, the ALJ found that
4 Aguayo was capable of performing her past relevant work as an appointment clerk and,
5 therefore, did not meet the Social Security Act's definition of disability. (Tr. 20-22)

6 **Standard of Review**

7 This court must affirm the ALJ's findings if they are supported by substantial
8 evidence and are free from reversible error. *Marcia v. Sullivan*, 900 F.2d 172, 174 (9th
9 Cir. 1990). Substantial evidence is more than a mere scintilla, but less than a
10 preponderance; it is "such relevant evidence as a reasonable mind might accept as
11 adequate to support a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971). In
12 determining whether substantial evidence supports the ALJ's decision, the court
13 considers the record as a whole, weighing both the evidence that supports and that which
14 detracts from the ALJ's conclusions. *Reddick v. Chater*, 157 F.3d 715, 720 (9th Cir.
15 1998). If there is sufficient evidence to support the ALJ's determination, the Court
16 cannot substitute its own determination. *See Young v. Sullivan*, 911 F.2d 180, 184 (9th
17 Cir. 1990). Thus, the Court must affirm the ALJ's decision where the evidence
18 considered in its entirety substantially supports it and the decision is free from reversible
19 error. 42 U.S.C. § 405(g); *Hammock v. Bowen*, 879 F.2d 498, 501 (9th Cir. 1989).

20 In evaluating the credibility of a claimant's testimony regarding alleged
21 symptoms, an ALJ must engage in a two-step analysis. *Smolen v. Chater*, 80 F.3d 1273,
22 1290 (9th Cir. 1996). First, the ALJ must determine whether there is objective medical
23 evidence of an underlying impairment that could reasonably be expected to produce the
24 alleged symptoms. *Id.* at 1281. Second, when there is no affirmative evidence
25 suggesting malingering, the ALJ must also set forth "specific, clear and convincing
26 reasons" before it can reject a claimant's testimony about the severity of symptoms. *Id.*
27 at 1283-84. *See Dodrill v. Shalala*, 12 F.3d 915, 918 (9th Cir. 1993). The clear and
28 convincing standard is the most heightened standard in Social Security Law. *Moore v.*

1 *Soc. Sec. Admin.*, 278 F.3d 920 (9th Cir. 2002). Once an underlying impairment is
2 verified, an ALJ cannot use a lack of full and objective medical corroboration to reject a
3 claimant's subjective symptoms. *Cotton v. Bowen*, 799 F.2d 1403, 1407 (9th Cir. 1986),
4 *superseded by statute on other grounds as stated in Bunnell v. Sullivan*, 912 F.2d 1149
5 (9th Cir.1990). To support a finding that the symptoms are not credible, the ALJ must
6 offer specific findings properly supported by the record in sufficient detail to allow a
7 reviewing court to review the findings for permissible grounds and freedom from
8 arbitrariness. (*Id.*)

9 **Analysis**

10 On appeal, Aguayo argues that the ALJ did not provide specific, clear and
11 convincing reasons for discounting her symptom testimony. (Doc. 15) The Court agrees.

12 The portion of ALJ's opinion that evaluated Aguayo's symptom testimony started
13 with the conclusion that Aguayo's "treatment records, examination results, and generally
14 conservative treatment history did not fully support [her] allegations." (Tr. 18) The
15 following paragraph discussed some of her treatment records. First, the opinion noted
16 that Aguayo was in "moderate" and "extreme" distress according to 2013 provider notes,
17 that she was not in "acute distress" during three emergency department trips between
18 September 2014 and March 2015 for fibromyalgia flares, and that her records indicated
19 that she was not in acute distress at a June 2015 provider appointment "despite alleging a
20 pain score of ten out of possible ten." (Tr. 18) It appears that the opinion discounted her
21 pain allegations because the records did not document "acute distress." This is not a
22 specific, clear and convincing reason. Her pain was sufficient to warrant trips to the
23 emergency department and the ALJ's opinion does not explain why documentation of
24 "acute distress" —presumably a condition that would wax and wane like fibromyalgia
25 itself—is needed to conclude that her statements about her pain were credible.

26 The following paragraph detailed Aguayo's examination results. First, the opinion
27 found that Aguayo's "subjective limitations were not fully supported by examination
28 results throughout the record, which were often unremarkable and, in some instances,

1 minimal.” (Tr. 18) This broad conclusion was followed by over two dozen citations to
2 the record. (Tr. 18-19) The opinion then stated, without citation, that Aguayo’s
3 “subjective allegation of a constant pain rated at an average of seven to nine was not
4 constant with physical examination findings through the record.” To the extent that this
5 statement was intended as a summary of the earlier citation string, it cannot stand because
6 there is insufficient detail to allow this Court to review the findings. *See Cotton*, 799
7 F.2d at 1407. Finally, the paragraph states, “[s]ignificantly, the undersigned noted the
8 claimant was assessed with bilateral upper extremity motor strength graded 5/5 (Exhibits
9 1F/68 and 3F/5), which undermined the claimant’s subjective allegations of experiencing
10 problems with her hands.” (Tr. 19) The Court notes that both of the citations were to the
11 same document, a July 2013 appointment with a nurse practitioner who never saw
12 Aguayo again. (Tr. 357) Moreover, Aguayo testified at the November 2014 hearing that
13 she dropped things “daily” and that her “symptoms [had] increased in the last year or
14 two.” (Tr. 43) Thus, the earlier medical note and her later testimony were consistent.

15 The following paragraph contains no citations and starts with the conclusion that
16 Aguayo’s “generally conservative treatments undermined her allegations of disabling
17 pain” and then states that “[r]eview of available treatment records did not show evidence
18 of physical therapy or injection therapy. In fact, the only noted injection was of Toradol
19 during an office visit on September 16, 2014. There was no suggestion of surgical
20 intervention for [Aguayo’s] degenerative disc disease.” (Tr. 19) These statements are
21 without any supporting citation and, therefore, cannot support the opinion’s conclusions.
22 Moreover, these statements imply that the ALJ had impermissibly made conclusions
23 about what kind of medical treatment Aguayo should have received.

24 Finally, this paragraph states that Aguayo’s pain could not be particularly severe
25 because her treatment records showed that, as she testified, she weaned herself off of
26 oxycodone. The Court disagrees and notes that she went to the emergency department in
27 March 2015 in severe pain after, and perhaps because, she had (laudably) stopped taking
28 oxycodone. (Tr. 402-405)

1 In the ultimate paragraph about Aguayo's symptom testimony, the opinion notes
2 that Aguayo claimed to have side effects from her medications but the three treating
3 source statements in the record all indicated that she did not experience side effects. Two
4 of these three treating source statements were from a nurse practitioner, not an acceptable
5 medical source, and one was from Aguayo's treating physician. (Tr. 19, citing 10F, 14F,
6 and 18F) Later in the opinion, the ALJ assigned "reduced weight" to all of these
7 statements. (Tr. 19, 20) In other words, the opinion discounted Aguayo's testimony
8 based on subsequently-discounted opinions. The ALJ cannot cherry pick the value of the
9 opinions.

10 In response to Aguayo's arguments, Defendant restates the opinion's conclusions.¹
11 (Doc. 20 at 3-4) Defendant then argues that "the ALJ's reasoning is easily discernible by
12 quick reference to the cited records." (Doc. 20 at 5) The Court disagrees. The opinion
13 contains long string cites, a general citation to a 71 page exhibit, and paragraphs without
14 any cites. This does not satisfy the specific, clear and convincing standard.

15 Remand

16 The decision to remand a case for additional evidence or for an award of benefits
17 is within the discretion of this court. *Swenson v. Sullivan*, 876 F.2d 683, 689 (9th Cir.
18 1989). The court can remand a case with instructions to award benefits when

19 (1) the record has been fully developed and further administrative
20 proceedings would serve no useful purpose; (2) the ALJ has failed to
21 provide legally sufficient reasons for rejecting evidence, whether claimant
22 testimony or medical opinion; and (3) if the improperly discredited
evidence were credited as true, the ALJ would be required to find the
claimant disabled on remand.

23 *Garrison v. Colvin*, 759 F.3d 995, 1020 (9th Cir. 2014). Here, all three parts of this test
24 have been met. First, the record was fully developed for the fixed time period at issue
25 and further administrative proceedings would impermissibly allow the "ALJ to have a
26 mulligan." *Id.* at 1021. Second, as described above, the ALJ did not provide a sufficient
27 explanation for rejecting Aguayo's symptom testimony. Finally, if the ALJ had found

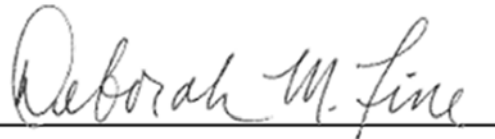
28 ¹ The Court reminds Defendant that, while citations to the record might support the ALJ's
opinion, this Court is constrained to reviewing the opinion and its citations.

1 her testimony credible, the ALJ would have found that Aguayo was disabled.

2 **IT IS THEREFORE ORDERED** that Juanita T. Aguayo's claim for disability is
3 remanded to the Commissioner of the Social Security Administration for an award of
4 benefits.

5 **IT IS FURTHER ORDERED** that the Clerk of the Court shall enter judgment
6 accordingly. The judgment will serve as the mandate of this Court.

7 Dated this 13th day of August, 2018.

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10 Honorable Deborah M. Fine
11 United States Magistrate Judge
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